DAM v Republic (Criminal Appeal 132 of 2018)
[2019] KEHC 8502 (KLR) (12 April 2019) (Judgment)

DAM v Republic [2019] eKLR

Neutral citation: [2019] KEHC 8502 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISII

CRIMINAL APPEAL 132 OF 2018

DAS MAJANJA, J

APRIL 12, 2019

BETWEEN

DAM ..... APPELLANT

AND

REPUBLIC ..... RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. S. K. Onjoro, SRM dated 14th December 2018 at the Magistrates Court in Kisii in Criminal Case (SO) No. 4 of 2016)

A child aged 16 years and above is better placed in a borstal institution rather than being sentenced to imprisonment

This case demonstrates the discretion of the court in sentencing children offenders depending with the circumstances of the case by imposing a custodial sentence to a child offender who was charged with a serious offence and who was close to attaining the age of majority.

Reported by Moses Rotich

Criminal Law *- sentencing of a child offender - the appellant (a minor) was charged with the offence of gang rape and stealing -where the appellant was convicted of the offence of rape and sentenced to 20 years imprisonment and the appellant was convicted of the offence of stealing and sentenced to 2 years imprisonment - whether the sentences of 20 years and 2 years imprisonment imposed on the appellant who was a minor when the alleged offences of gang rape and stealing were committed were lawful - Sexual Offences Act, No 3 of 2006, section 10; Penal Code, Cap 63 Laws of Kenya, sections 268 and 275, Children Act, 2001 section 190(1)*

Brief facts

The appellant (a minor) was charged with the offence of gang rape contrary to section 10 of the Sexual Offences Act, No 3 of 2006 (Sexual Offences Act). After a full trial, he was convicted of gang rape and sentenced to 20 years' imprisonment. In addition, the appellant was charged with the offence of stealing contrary to section 268 as read with section 275 of the Penal Code, Cap 63 Laws of Kenya (Penal Code). He was convicted of the

offence of stealing and sentenced to 2 years' imprisonment. Aggrieved by the decision of the trial court, the appellant filed an appeal against both conviction and sentence. It was the appellant's case that the prosecution did not prove its case beyond reasonable doubt. He argued that there was no sufficient evidence to tie him to the offences of rape and stealing and that the medical evidence did not implicate him.

Issues

i. Whether the prosecution had proved the offences of rape and stealing against the appellant beyond reasonable doubt.
ii. Whether the sentence of 20 years' imprisonment imposed on the appellant who was a minor at the time of commission of the offence was lawful.

Held

1. It was the duty of the prosecution to prove beyond reasonable doubt that the complainant did not consent to the act of penetration. The complainant gave clear and consistent evidence of how she was sexually violated by two assailants who were both armed. The clinical officer confirmed that the complainant had blunt injuries on her forearm and her vagina had a tear. It was therefore clear to the court that the prosecution proved the offence of rape. In addition, the complainant testified that she was attacked and raped by two assailants thereby bringing the case within section 10 of the Sexual Offences Act.
2. The complainant recognized both assailants. The complainant stated that the appellant was her step son as his mother was her co-wife. The instant case was therefore that of recognition. The complainant also testified that after the assailants raped her, they lit the lamp and proceeded to eat the ugali she had cooked earlier. Thus, the time spent with the assailants and their proximity left no doubt that the appellant was properly identified.
3. The evidence of the complainant was clear that the appellant and his co-accused took her sufurias and Kshs. 2000/- which she had hidden under her mattress. Consequently, the offence of stealing was also established.
4. The record indicated that when the appellant was arraigned in court his age was assessed to be 17½ years. The appellant was thus a child for the purposes of the Children Act and ought to have been sentenced in accordance with section 191 of the Children Act.
5. The appellant ought to have been committed to a borstal institution. However, under the Borstal Institutions Act, Cap 92 Laws of Kenya a child could only be committed to a borstal institution if he was above 16 years old and for not more than 3 years. Given that the appellant was 17½ years, committal to a borstal institution was *prima facie* out of the question.
6. Courts were empowered to sentence a child offender in any other lawful manner as provided for under section 191(l) of the Children Act through imposing a sentence of imprisonment and taking into account the status of the offender as a child. In re-considering the sentence, the court took into account the fact that the appellant raped his 90-year-old step mother in the company of another person. Although he was a minor, he committed a serious offence that required a custodial sentence.

Appeal partly allowed.

Orders

i. The conviction of the appellant by the trial court was upheld.
ii. The sentence of 20 years' imprisonment meted on the appellant by the trial court was set aside and substituted with a sentence of 6 years' imprisonment to run from June 20, 2016 when the appellant was first arraigned in court

Citations

Cases

Kenya

1. *Abuya, Dennis v Republic* Criminal Appeal 164 of 2009; [2010] KECA 382 (KLR) - (Explained)
2. *Anjononi & others v Republic* Criminal Appeal 480, 208 and 209 of 1978; [1980] KECA 23 (KLR); [1980] KLR 59 - (Explained)
3. *DKC v Republic* Criminal Appeal 184 of 2009; [2014] KECA 230 (KLR) - (Explained)
4. *JKK v Republic* Criminal Appeal 118 of 2011; [2013] eKLR - (Explained)
5. *SCN v Republic* Criminal Appeal 55 of 2015; [2018] eKLR - (Mentioned)

Statutes

Kenya

1. Borstal Institutions Act (cap 92) In general - (Cited)
2. Children Act (cap 141) section 191(l) - (Interpreted)
3. Penal Code (cap 63) sections 268, 275 - (Interpreted)
4. Sexual Offences Act (cap 63A) sections 3(1); 10 - (Interpreted)

Advocates

Mr Otieno Senior Prosecution Counsel, for the respondent

JUDGMENT

1. The appellant, DAM, was charged, convicted and sentenced to 20 years' imprisonment for the offence of gang rape contrary to section 10 of the *Sexual Offences Act* ("the Act"). It was alleged that on June 16, 2016 within Kisii County in association with another not before the court, he intentionally and unlawfully caused his penis to penetrate the vagina of AN without her consent.

2. The appellant was also charged, convicted and sentenced to 2 years' imprisonment for the offence of stealing contrary to section 268 as read with section 275 of the *Penal Code* (chapter 63 of the Laws of Kenya) in that on the same date in same locality jointly with others not before the court, he stole two sufurias valued at Kshs 1,200 and cash Kshs 2,000/- the property of AN.

3. Before I proceed to consider the grounds of appeal, I remind myself of the duty of the first appellate court. It is to re-appraise the evidence afresh and reach an independent decision as to whether to uphold the conviction. The court must bear in mind that it neither heard or saw the witnesses testify. In dealing with this task, I shall outline the evidence before the trial court.

4. The complainant (PW1) testified that she was 90 years old and on June 16, 2016 at about 9.30pm, the appellant with his co-accused broke into her house as she was sleeping. She testified that they were armed with a panga and metal rod and they both proceeded to rape her. She told the court the appellant's co-accused raped her first then the appellant. Thereafter they put on the lights and started eating the ugali she had cooked. They took her two sufurias and left with the Kshs 2,000/- she had kept under her bed. She recalled that when she wanted to scream during her ordeal, they put a panga on her neck. After they left, she walked limping to the home of her daughter in law (PW2) and narrated to her what happened. Her daughter informed other villagers whereupon she was taken to hospital and the matter reported to the police.

5. PW2 testified that PW1 came to her home in the morning and narrated her ordeal. She informed her uncle and they took her to the hospital. PW2 told the court PW1 named the appellant and his co-accused as the people who raped her. PW3 was one of the community policing members who came to the home of PW1. He recalled that PW1 identified the appellant as one of the people who raped her.

6. A registered clinical officer, PW4, testified that he examined PW1 after two days of the incident. He noted that she had a swelling on the right forearm which was tender and which he opined was caused

by a blunt object. He observed a tear on the lateral aspect of the vagina. He confirmed that there was penetration.

7. The investigating officer gave an account of the investigation. He recalled the PW 1 reported the incident of rape on June 18, 2016 at about 10.30am. He stated that the appellant was arrested by Administration Police officers from Iyabe AP Post on June 17, 2016 and brought to Gesonso Police Station. He visited the home of PW 1 and noted that a hole had been dug in the wall of PW 1's house.

8. In his unsworn statement, the appellant denied the offence. He stated he was arrested on April 12, 2016 by members of the Community policing and later arraigned in court.

9. The appellant, in his memorandum of appeal and written submissions contends that the prosecution did not prove the offence beyond reasonable doubt. He stated that there was insufficient evidence to tie him to the offence and that the medical evidence did not implicate him. Counsel for the respondent, on the other, hand supported the conviction and sentence and urged that the prosecution proved all the elements of the offence.

10. The offence of gang rape is provided for under section 10 of the *Sexual Offences Act* which states;

> Any person who commits the offence of rape or defilement under this Act in association with another or others, or any person who, with common intention, is in the company of another or others who commit the offence of rape or defilement is guilty of an offence termed gang rape and is liable upon conviction to imprisonment for a term of not less than fifteen years but which may be enhanced to imprisonment for life.

11. The essential element of gang rape is rape committed in association with two or more persons. The ingredients of rape which the prosecution must prove are set out in section 3(1) of the *Sexual Offences Act*, 2006;

A person commits the offence termed rape if –

(a) He or she intentionally or unlawfully commits an act which causes penetration with his or genital organs.

(b) The other person does not consent to the penetration; or

(c) The consent is obtained by force or by means of threats or intimidation of any kind.

12. The key issue for consideration is whether PW 1 consented to the act of penetration. It was the duty of the prosecution to prove beyond reasonable doubt that PW 1 did not consent to the act penetration. In this case, PW 1 was aged 90 years. She gave clear and consistent evidence on how she was sexually violated by two assailants who were both armed. PW 2 to whom she reported the next morning, saw her in a state of distress and the clinical officer, PW 4, confirmed that she had blunt injuries on her forearm consistent with assaulted and her vagina had a tear. I therefore find and hold that the prosecution proved the offence of rape. In addition, PW 1 also testified that she was attacked and raped by two assailants bringing the case within section 10 of the *Act*.

13. As to the issue of identity of the assailants, PW 1 recognised both assailants. She stated that the appellant was his step son as his mother was her co-wife. This therefore was a case of recognition. The Court of Appeal held in *Anjononi & others v Republic* [1980] KLR 59 that the evidence of recognition of a suspect is more assuring and reliable than the identification of a stranger but it nevertheless must be examined carefully to avoid a miscarriage of justice due to mistaken identity. PW 1 told the court that after the assailants had raped her, they lit the lamp and proceeded to eat the ugali she had cooked earlier. I therefore find that the time spent with the assailants and their proximity leaves no doubt that

the appellant was properly identified. The identity of the appellant was fortified by the fact that she named the assailants to the people she first met causing the appellant to be arrested.

14. The evidence of PW 1 was also clear that the appellant and his co-accused took her sufuria and Kshs 2000/- which she had hidden under her mattress. I therefore find and hold that the offence of stealing was established. I affirm the conviction on both counts 1 and 2.

15. As regards the sentence, the record show that when the appellant was arraigned in court his age was assessed to be 17 ½ years. He was thus a child for purposes of the *Children Act* and ought to have sentenced in accordance with section 191 thereof which states as follows:

191

(1) In spite of the provisions of any other law and subject to this Act, where a child is tried for an offence, and the court is satisfied as to his guilt, the court may deal with the case in one or more of the following ways—

(a) By discharging the offender under section 35(1) of the Penal Code (cap 63);

(b) by discharging the offender on his entering into a recognisance, with or without sureties;

(c) by making a probation order against the offender under the provisions of the Probation of Offenders Act (cap 64);

(d) by committing the offender to the care of a fit person, whether a relative or not, or a charitable children's institution willing to undertake his care;

(e) if the offender is above ten years and under fifteen years of age, by ordering him to be sent to a rehabilitation school suitable to his needs and attainments;

(f) by ordering the offender to pay a fine, compensation or costs, or any or all of them;

(g) in the case of a child who has attained the age of sixteen years dealing with him, in accordance with any Act which provides for the establishment and regulation of borstal institutions;

(h) by placing the offender under the care of a qualified counsellor;

(i) by ordering him to be placed in an educational institution or a vocational training programme;

(j) by ordering him to be placed in a probation hostel under provisions of the Probation of Offenders Act (cap 64);

(k) by making a community service order; or

(l) in any other lawful manner. [Emphasis supplied].

16. The appellant ought to have been committed to a Borstal Institution but under the *Borstal Institutions Act* (chapter 92 of the Laws of Kenya) a child can only be committed to a Borstal institution if he is above 16 years old and then for not more than three years. As the appellant was 17 ½ years old, committal to a borstal institution was *prima facie* out of the question. In *Dennis Abuya v Republic*

KSM CA CR App No 164 of 2009 [2010] eKLR, the Court of Appeal seemed to suggest that a sentence of imprisonment was also out of the question for a child. It observed as follows:

> Neither the trial magistrate, nor the learned judge on first appeal dealt with the issue of the appellant's age at the time he allegedly committed the offence. It may be that he was eighteen years of age at the relevant time; but it may equally be that he was below eighteen years at the time. We do not understand the provisions of the *Sexual Offences Act* to authorize the imprisonment of minors and we are unable, on the material on record, to rule out the possibility that the appellant was under eighteen years on June 19, 2007 when the offence was allegedly committed. Section 8(7) of the *Sexual Offences Act* which states, "Where a person is charged with an offence under this Act is below the age of eighteen years, the court may upon conviction, sentence the accused person in accordance with the provisions of the *Borstal Institutions Act* and the *Children Act*." The question of imprisoning a minor does not, therefore, arise under the provisions of the *Sexual Offences Act*.

17. The dilemma of young offenders who are on the cusp of adulthood yet they cannot be accommodated within the prison system was considered in by the Court of Appeal in *JKK Republic* NYR CA Criminal Appeal No 118 of 2011 [2013] eKLR where it observed as follows:

> The dilemma we face in this appeal was the ascertainment of the age of the appellant. Going by the remarks by the Judge, he was about 17 years when he was first arraigned in court in March, 2009, it is now four years later, which means he is now over the age of 18 years, therefore, he is not suitable to be subjected to any of the sentences provided for under the Children Act. The purposes of the sentences provided for under the Children Act are meant to correct and rehabilitate a young offender, ie any person below the age of 18 years while taking into account the overarching objective is the preservation of the life of the child and his best interest. A death sentence or a life imprisonment are not provided for but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. The offence committed by the appellant is very serious, an innocent life was lost, the appellant though probably a minor when he committed the offence must serve a custodial sentence so that he can be brought to bear the weight and responsibility of his omission or lack of judgment, by serving a custodial sentence. We are of the view that the appellant who is now of the age of majority cannot be released to the society before he is helped to understand the consequences of his mistakes, which can only happen after serving a custodial sentence.

18. The same position was emphasized by the Court of Appeal *DKC v Republic* NYR CA Criminal Appeal No 189 of 2009 [2014] eKLR where it had to deal with a 15-year-old child who had been convicted of murder. It stated as follows:

> Whatever the case, life imprisonment is not provided for under the Children Act, but when dealing with an offender who has attained the age of 16 years, the court can sentence him in any other lawful manner. We think that due to the gravity of the offence, and the current age of the appellant, he cannot be released to the society without being brought to terms with the consequences of his action or omissions by a custodial sentence. It is for this reason that we are inclined to allow the appeal against the life sentence imposed by the trial court and substitute it with imprisonment for a period of 10 years from the date of conviction. We therefore allow the appeal to the extent that the life sentence imposed on the appellant is substituted with ten years imprisonment.

19. From the aforesaid decisions, it is clear that the court is empowered to sentence a child offender, "in any other lawful manner" as provided by section 191 (l) of the *Children Act* by imposing a sentence of imprisonment and taking into account the status of the offender as a child (see also *SCN v Republic* Naivasha High Court Criminal Appeal NVS HCCRA No 55 of 2015 [2018]eKLR.

20. For the reasons I have stated, I set aside the sentence. In re-considering the sentence, I have taken into account the fact that the appellant raped his 90 year old step mother in the company of another person. Although he is a first offender, the offence he committed was serious and calls for a custodial sentence. I would therefore sentence him to 6 years imprisonment.

21. I affirm the conviction. I allow the appeal to the extent that that I set aside the sentence of 20 years' imprisonment and substitute it with 6 years' imprisonment to run from June 20, 2016 when the appellant was arraigned in court. The sentence shall run concurrently with the sentence on count 1.

DATED AND DELIVERED AT KISII ON THIS 12TH DAY OF APRIL 2019.

D.S. MAJANJA

JUDGE

Appellant in person.

Mr Otieno, Senior Prosecution Counsel, instructed by the Office of the Director of Public Prosecutions for the respondent.